In the United States Circuit Court of Appeals for the Ninth District

EMMA C. LEE and H. LEE, her husband,
Plaintiffs in Error,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON, LILLIE LEVISON, MARY A. OSTROSKI, and NATIONAL SURETY COMPANY, a corporation,
Defendants in Error.

No. 3033.

IN ERROR FROM DISTRICT COURT FOR NORTHERN DISTRICT OF CALIFORNIA, SECOND DIVISION.

BRIEF OF PLAINTIFFS IN ERROR.

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STATEMENT OF THE CASE.

This case comes up on a writ of error to review the judgment of the court below dismissing a complaint of the plaintiffs below upon orders sustaining demurrers thereto by the defendants Alexander and

Lillie Levison, and National Surety Company; the plaintiffs having stood upon their complaint and declined to re-plead.

The complaint, after alleging that plaintiffs at all times mentioned have been and still are husband and wife and citizens and residents of the State of Washington, and that the defendants other than National Surety Company are citizens of the State of California and residents of San Francisco County and the defendant National Surety Company is a citizen of the State of New York and also (by maintaining an office and transacting business, under due authorization, in San Francisco) an inhabitant and resident of San Francisco county, California, charges that on July 21st, 1909, the defendants, "wrongfully contriving and combining together to injure and harass the plaintiff, and unlawfully to coerce her into paying to the defendant Alexander Levison certain moneys which she did not owe . . . him, caused proceedings to be instituted against the plaintiff . . . for her arrest and prosecution . . . upon a charge of embezzlement of certain moneys . . .;" that to that end the defendant Bernstein, at the instance of all his co-defendants, swore out a warrant for her arrest on that charge; that she was

arrested on that warrant and lodged in jail at San Francisco; and that on July 29th, 1909, she was tried upon that charge, and acquitted. The complaint next alleges that said charge was made and said arrest, imprisonment and prosecution instituted and carried on by the defendants, maliciously and without probable cause; and that by reason of the premises the plaintiff was damaged in the sum of $25,000. The complaint then sets forth, in substance, that within nine months after said date first above named the plaintiff brought suit in the Superior Court of the State of California for San Francisco county against the same defendants here sued upon the same cause of action above outlined, for the same damages here claimed; that in said action all said defendants appeared and defended, issues of fact were joined, the cause was brought to trial on October 9th, 1911, and the plaintiff was non-suited by the trial court, whereupon she appealed to the Supreme Court of the State of California from a judgment of dismissal entered against her on said non-suit, and said supreme court, on July 26th, 1916, affirmed said non-suit and judgment of dismissal; and that said non-suit and judgment of dismissal of said action in said state courts were and are not a bar to another action by the

plaintiff against the defendants upon the same cause of action, in said United States District Court,—of concurrent jurisdiction with said state courts,—but the pendency of said former action in said state courts prevented the plaintiff from bringing this action in said district court until said final disposition of said former action in said state supreme court. Judgment is demanded against the defendants for $25,000 damages, and costs. This action was begun by filing the complaint in the court below on November 27th, 1916—only four months after the affirmance by the state supreme court of the non-suit and dismissal of the former action; and summons was issued to the marshal on December 11th for service on all defendants.

The Levisons demurred to the complaint jointly, and the National Surety Company separately; one or both of the demurrers specifying sundry statutory grounds of demurrer, and raising other minor points,—none of which need be noticed here, as the court below ignored them,—and both specifying the ground, on which alone they were sustained by the court below, that the action was barred by the California statute of limitations.

The plaintiffs in error submit the following:

ASSIGNMENT OF ERROR.

The court below erred in sustaining the demurrers to the complaint, and in rendering judgment of dismissal thereon.

POINTS FOR REVERSAL.

I.

The statute of limitations is tolled under the California Code of Civil Procedure, §355.

II.

The statute of limitations is tolled under the California Code of Civil Procedure, §352.

ARGUMENT.

I.

As already summarized in our statement of the case, the complaint shows that within the period of statutory limitation an action by these plaintiffs against these defendants was brought and prosecuted to trial in the state court, wherein the plaintiffs were non-suited; that plaintiffs appealed from that judgment to the state supreme court, which affirmed that judgment; and that four months after that affirmance this action was brought, against the same defendants, for the same relief sought in the former action.

The statute here relied on by the plaintiffs in error (§355) provides:

"If an action is commenced within the period prescribed therefor, and a judgment thereon for the plaintiff be reversed on appeal, the plaintiff . . . may commence a new action within one year after the reversal."

This case does not fall with the *literal* terms of this statute; but the courts of California as well as of other states have held cases to fall within the *equity* of this and similar statutes though not within their words—in short, have construed such statutes *liberally,* so as to counteract the harshness of otherwise unqualified statutes of limitation, which are never favored or extended.

Thus, the Supreme Court of California has held that this section operates to toll the statute although the *new action* (the *words* of the statute) is not the same in form or character as that in which a judgment for the plaintiff was reversed, so long as it is one having for its object the same relief.

Kenney vs. Parks, 137 Cal. 527; 70 Pac. 556.

Similarly, in Tennessee it was held, construing a similar statute in which only the words "new action" were used, that any proceeding *equivalent*

to a new action, though not an action at all, might be brought within the period allowed.

Thomas vs. Pointer, 14 Lea (Tenn.), 343.

And in Georgia, the new suit brought by leave of such a statute may be waged in the name of the real party in interest, though not the plaintiff in the suit dismissed.

Gordon vs. McCauley, 73 Ga. 667.

Nor need the new suit be a literal copy of the first, or be waged against all the defendants to the first suit, where a joint and several liability is claimed (as here, in an action for malicious prosecution against joint tort feasors).

Cox vs. Strickland, 120 Ga. 104; 47 S. E. 912.

In Massachusetts it was early held (per Shaw, Ch. J.) that where, after suit and judgment against an administrator, his letters were held void in another proceedings,—after which he was granted new and valid letters of administration,—and thereafter, in a *scire facias* sued out on the judgment mentioned, a plea *puis darrien continuance* on the ground of the nullity of the first letters was sustained, a new suit, begun within a year after that decision but after the statutory limitation had run, was within the spirit, though not the letter, of a

statute substantially equivalent to that of California; the learned Chief Justice saying:

"The proviso in the statute follows this obvious consideration, . . . that where the plaintiff has been *defeated by some matter not involving the merits,* some defect or informality, which he can remedy or avoid by a new process, the statute shall not prevent him from doing so, provided he follows it promptly by suit within a year."

Coffin vs. Cottle, 16 Pick. (Mass.) 383.

In New York the *mere words* of the saving statute were likewise broadened by judicial construction. Thus, where an action brought by a *feme sole* had abated by her marriage, she and her husband were given a new action after the period of limitation had run, as within the *equity* of the statute (N. Y. R. L. ch. 186, §5, corresponding with §§3, 4 of the original English statute, 21 Jac. I., ch. 16).

Huntington vs. Brinckerhoff, 10 Wend. (N. Y.) 276.

And where, in an action brought within the limitation period, the plaintiff died before judgment, his executor was given a new action after the limitation had run, as within the *equity* of the first proviso of the New York statute cited above.

Barker vs. Millard, 16 Wend. 572.

In Vermont even a discontinuance of the first suit worked by the court's loss of jurisdiction (without the plaintiff's fault) was held to be "clearly within the equity of the (statutory) proviso, although not strictly within its terms." "The same is true where the plaintiff is compelled, by some error in pleading, variance, or otherwise, to become non-suit, without his own fault. And no doubt there are many other cases, not coming technically within the terms of the proviso, which would still be held to come within its equity." (Per Redfield, J.)

Phelps vs. Wood, 9 Vt. 399; followed, *Spear vs. Curtis,* 40 Id. 59.

In Rhode Island, the statutory words "abated, avoided, or otherwise defeated," were held to cover a voluntary as well as an involuntary non-suit of the first action.

Robinson vs. Transp. Co., 16 R. I. 637; 19 Atl. 113.

Even a dismissal of the first action for want of prosecution was held, in Georgia, to bring a new action, brought after limitation run, within the *spirit* of a saving statute.

Roundtree vs. Key, 71 Ga. 214.

And in that state a suit seasonably brought in

a court having jurisdiction of the subject matter, though not (as ruled in its course, resulting in its dismissal) of the defendant's person, operated to toll the statute of limitations within the *intent* of a saving statute not unlike the section of the California code under consideration.

Atlanta R. Co. vs. Wilson, 119 Ga. 781; 47 S. E. 366.

In Ohio, it was held that a similar statute operated to sustain a second suit in a state court, otherwise barred by limitation, although the first suit, begun in a federal court of concurrent jurisdiction, had been dismissed for lack of jurisdiction in that court by reason of non-diversity of citizenship of the plaintiff and a defendant.

Pittsburg R. Co. vs. Bemis, 64 Ohio St. 26; 59 N. E. 745.

The opinion in this last case (by Spear, J.) is most instructive in the discussion of the object and spirit of all such saving statutes, and it cites and analyses a multitude of cases illustrating the variety of ways in which courts have stretched the scope and application of statutory words so as to save parties' causes from being held barred by limitation where

their first presentation has in any manner failed of reaching adjudication on the merits.

The saving provisos of these and other states vary much in phrase—some of them are identical in wording with the California statute, some are its substantial equivalent, some are much broader in their express terms; but not one of them is nearly so broad in its literal text as the scope given to it by judicial interpretation. These decisions serve, then, to show the marked leaning of all our courts toward statutory constructions that will save a litigant's grievance from the bar of limitation if it has once been brought seasonably into court but has failed of reaching an adjudication *on the merits.*

Scanning §355 of the California code in that spirit, its *equity* will be found ample to embrace this case. Its *terms* permit a new action (although otherwise barred by time) where the first action, prevailing in the trial court, has been reversed on appeal. The case literally specified rarely gives occasion for a new action, since a *venire de novo* is almost invariably awarded on such a reversal. But the case at bar, though not that literally specified in the statute, differs from it not at all in essence. In the statute-described case, the plaintiff prevailed below but failed above, on the defendant's appeal;

in the case at bar, the plaintiff failed below (but not on the merits, as shown below) and, not content to abide by a mere trial judge's decision, himself appealed, and failed again above. Where is the essential difference between this and a case within the very words of the statute? Does the statute mean to provide that an appellate adverse decision *shall* leave it open to a plaintiff to sue anew regardless of a time limitation, but that if there is added to that adverse decision the weight of a mere trial judge's previous ruling to the same effect, the double decision *shall not* leave it open to the plaintiff to sue anew? Such a causeless distinction can hardly have been contemplated by the lawgiver. Or does the statute mean to extend its grace to a plaintiff who resisted, though unsuccessfully, the defendant's appeal from a ruling for plaintiff below, but not to a plaintiff who took upon himself the burden of a vain appeal from a ruling below adverse to himself? Hardly such a *non-sequitur* as this either, we submit.

Look at it as we will, the equity of leave to "try again" to the litigant who has been defeated both below and above—but not on the merits—is at least as strong as that in favor of one who has pre-

vailed below but on appeal has found the ruling below a broken reed.

And it must always be borne in mind that the nonsuiting of the plaintiffs' first action, below as well as above, was not a decision *on the merits.* For a judgment on the merits is always a bar—*res judicata;* but a judgment of nonsuit is, by express statutory declaration, *not* a bar; therefore, it is not a decision on the merits.

> *Cal. Code C. P.,* Pt. II. Tit. VIII. Ch. I., §581 (5), and §582.

Were no statute of limitations involved, and had the plaintiffs, upon the trial judge's nonsuiting them, refrained from appealing, submitted to the judgment of dismissal on the nonsuit, and immediately sued anew in the state court, there can be no question that, under the code provisions last cited, the nonsuit in the first case would not have been a bar to the second. This is the test; and the fact that the plaintiffs have sued anew in a federal court of concurrent jurisdiction instead of in the same court as previously, cannot operate to make that a decision on the merits and consequently a bar which was not such in the state court, or assist the bar of time limitation if the plaintiffs would have been entitled

to toll that limitation had they sued anew in the original forum.

II.

The California Code of Civil Procedure, §352, provides that—

"If a person entitled to bring an action . . . be at the time the cause of action accrued, either:

. . . 4. A married woman, and her husband be a necessary party with her in commencing such action;

—The time of such disability is not a part of the time limited for the commencement of the action."

If under our first point we have failed to induce the court to extend by construction, like many other courts, the literal terms of §355 C. C. P., then it logically follows that the court as well as the plaintiffs must be thrown back upon and bound to adhere to a like literal construction of §352; taking nothing from its words, since the court would add nothing to the words of §355. Applying §352 in this way, the plaintiffs are not barred from suing upon the cause of action set forth in this complaint—will never be barred, indeed, so long as their coverture subsists and as a previous suit has not reached a judgment on the merits.

For the complaint alleges that "The plaintiffs

at all the times in this complaint mentioned were and they still are husband and wife''—an averment embracive of the time when the malicious prosecution complained of was instituted and the cause of action thereon accrued. And to an action for malicious prosecution of a wife her husband is a *necessary co-party plaintiff with her.*

"When a married woman is a party, her husband must be joined with her, except:

1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone. . . ."

Cal. C. C. P., §370.

Here is a mandatory rule that the husband *must* join with the wife whenever she sues, subject to an exception inapplicable to this case (the other exceptions, not quoted above, are palpably irrelevant); since a cause of action for malicious prosecution of a married woman, if "property" at all, is not her separate property, but community property of her and her husband.

San Antonio vs. Wildenstein, 109 S. W. (Texas) 231.

Section 370, therefore, absolutely compels the husband's joinder with the wife in the action; while the letter of section 352, as quoted above, establishes her disability to sue during coverture for this dam-

age provided her husband is a necessary party. This seems an absurd result, inasmuch as the husband did join with her in the former suit upon this cause of action, and now joins with her again in this suit; but *ita lex scripta est.*

We are here simply insisting, let us repeat, that if the court cannot see its way to extending section 355 by construction so as to cover the equity of the plaintiffs' case and save the cause of action from bar by limitation, it will be equally bound, in like adherence to the literal text of sections 352 and 370, to apply them together and thus save the cause of action from bar by reason of the wife's *disability* hitherto—for the existence still of that disability has not been set up as a ground of the demurrers.

The California supreme court has held that section 340, subdivision 3, the limitation applicable to our cause of action, must be read in connection with this section 352.

Morrell vs. Morgan, 65 Cal. 575; 4 Pac. 580.

In conclusion, we respectfully beg leave to cite to the court, in further support of this second point, the article (or story) "Under Disability" in *Case and Comment* for December, 1916 (vol. 23, No. 7),

pp. 581-4, and the authorities there cited in note 6, on page 584.

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